



THE SUPREME COURT OF KENYA

**THE CABINET SECRETARY FOR THE
NATIONAL TREASURY AND PLANNING & 4 OTHERS VS. OKIYA OMTATAH OKOITI & 52
OTHERS**

SC PETITION NOS. E031, E032 & E033 OF 2024

DATE OF JUDGMENT: 29th October, 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court partially allows the consolidated appeal.

Background

This consolidated appeal concerns the legislative process leading to the enactment of the Finance Bill, 2023 (the Bill) into the Finance Act, 2023 (the Act), upon receiving Presidential assent on 26th June, 2023. Following the enactment, a total of 11 petitions were lodged before the High Court by the 1st to 49th respondents, all of which challenged the constitutionality of the Act. The petitions were subsequently consolidated.

At the High Court

The contention against the Act was broadly two-fold; that the legislative process and the contents of the Act were unconstitutional. To this end, the petitioners argued, first, that parts of the Act went beyond the scope of a money Bill as defined in Article 114 of the Constitution. Secondly, that the legislative process lacked concurrence from both the Speakers of the National Assembly and the Senate; that the Senate did not consider the Bill, despite it allegedly containing matters concerning County Government; that public participation was inadequate, with most input dismissed; and that new amendments introduced by the National Assembly after public participation were not open to further public input. Additionally, they argued that the estimates tabled before the National Assembly were incomplete in omitting the estimates of revenue of the National Government. In the end, the consolidated petition urged that the Act was discriminative, punitive and unconstitutional and sought a declaration that the entire Act is unconstitutional, and in the alternative, that specific provisions of the Act are unconstitutional.

The High Court allowed the consolidated petitions to the following extent: Sections 76, 78, 87, 88, and 89 of the Finance Act, 2023 were declared unconstitutional, null, and void, affecting amendments to the Kenya Roads Act, Unclaimed Assets Act, and the repeal of a provision in the Statutory Instruments Act. Additionally, Section 84 was unconstitutional for violating Articles 10(2)(b), (c), and 201 of the Constitution. Consequently, the court issued a prohibition against the collection of the 'Affordable Housing Levy'. All other prayers in the petition were dismissed, with each party ordered to bear its costs.

At the Court of Appeal

On appeal and cross-appeal, the Court of Appeal dismissed the contentions on the affordable housing levy and Statutory Instruments Act for being moot. The Court also dismissed the cross appeals for being devoid of merit, save to the extent that the High Court misconstrued its jurisdiction under Article 165 (3) in holding that it had no jurisdiction to intervene in policy matters. The court however affirmed that Sections 76 and 78 of the Act which amended the Kenya Roads Act, were unconstitutional, null and void; and upheld the finding that concurrence of both houses in the enactment of the Act was not a requirement of a money Bill under Article 114. The court further declared 21 Sections of the Act, introduced by the National Assembly post the public participation phase, as unconstitutional for want of fresh public participation, and having been enacted in violation of the Constitution; the prayer for refund of taxes collected under the said provisions was declined for not having been sought before the High Court; the enactment of the Act violated various provisions of the Constitution and the Public Finance and Management Act (PFM Act), on the budget-making process thus rendering the Act fundamentally flawed and void; the court found that Parliament is obligated to provide reasons for adopting or rejecting any proposals received from members of the public during the public participation process; and lastly the court held that the failure to comply rendered the entire Act unconstitutional. No order as to costs was issued due to the public interest nature of the matter.

At the Supreme Court

Cumulatively, the consolidated appeal sought the following orders:

- i. The consolidated appeal be allowed.*
- ii. The impugned decision of the Court of Appeal be set aside in its entirety, and be substituted with an order either setting aside part of the High Court judgment of 28th November, 2023 declaring Section 76, 77, 78, 84, 87, 88 and 89 of the Finance Act, 2023 unconstitutional, and/or allowing Civil Appeal No. E003 of 2023.*
- iii. Costs of the consolidated appeal.*

The cross-appeals sought the following reliefs:

- i. The cross-appeals be hereby allowed.*
- ii. A declaration that Article 109(5) of the Constitution only restricts the introduction (and not enactment) of money Bills to the National Assembly.*
- iii. A declaration that the Act is unconstitutional for failure to involve the Senate in its enactment.*
- iv. A declaration is issued that the Act violates Articles 10, 21(3), and 201 of the Constitution which require tax measures to be socially just, fair, equitable, and progressive.*
- v. An order that all taxes collected by KRA from the date of enactment of Act be refunded to the public.*
- vi. The consolidated appeals be dismissed.*
- vii. An order for costs.*

Issues For Determination

Having considered the pleadings, the impugned judgment, and the parties' respective submissions, the Court framed the following nine issues for its determination:

- i. *Whether the Court has jurisdiction to hear and determine SC Appeals Nos. E032 and E033 of 2024.*
- ii. *Whether the Finance Act, 2023 was subject to the concurrence process under Article 110(3) of the Constitution.*
- iii. *Whether fresh public participation should be undertaken where Parliament amends provisions of a Bill or introduces new provisions in a Bill after initial public participation.*
- iv. *Whether Parliament has an obligation, upon conclusion of the public participation exercise, to provide detailed reasons for accepting or rejecting views, and whether failure to give reasons vitiates the legislative process and invalidates the legislation passed.*
- v. *Whether the Appropriation Act, 2023 contained the estimates of revenue.*
- vi. *Whether the question of the validity of Section 84 of the Finance Act, 2023 (Affordable Housing Levy) is moot.*
- vii. *Whether a court has jurisdiction to test the legality of policy positions taken by the Executive and Parliament in the legislative process; and if so, whether the impugned sections of the Finance Act relating to various tax legislations are unconstitutional.*
- viii. *What considerations should a Court take into account in declaring a statute as unconstitutional, and what consequential orders ought a court issue upon making a declaration of unconstitutionality of a statute or parts thereof?*

Findings of the Court

Upon consideration, the Supreme Court has partially allowed the consolidated appeal and has made the following findings:

- a) *The Court has jurisdiction to determine SC Petition Nos. E032 & E034 of 2024 under Article 163(4)(a) of the Constitution.*
- b) *The question relating to Section 84 (Affordable Housing Levy) of the Act is moot.*
- c) *Sections 76 and 78 of the Act amending Section 7 of the Kenya Roads Act, 1999; Section 87 of the Act amending Section 28 of the Unclaimed Assets Act, 2011 are unconstitutional as they were neither incidental nor directly connected to a money Bill.*
- d) *The prayer for refund of taxes paid, fails.*
- e) *A Finance Bill is a money Bill contemplated under Article 114 of the Constitution.*
- f) *The Speaker of the National Assembly and the Speaker of Senate concurred that the Finance Bill, 2023 does not concern County Government.*

- g) Two new provisions being Sections 23 and 79 were minor/technical amendments. However, the other 15 new provisions being Sections 18, 21, 32, 38, 44, 69, 80, 81, 82, 83, 85, 86, 100, 101, and 102 were substantive amendments. In addition, amendments to Sections 24, 26, 47 and 72, were substantive amendments.
- h) Where new and substantive amendments are effected pursuant to public participation, Parliament is not required to undertake fresh public participation.
- i) Bearing in mind the time-sensitive nature of a Finance Bill, it is unreasonable to require or subject amendments intended to give effect to proposals and suggestions from a public participation exercise to another fresh round of public participation.
- j) Parliament exercises administrative powers in some of its functions including investigations, recommendations, and findings by its respective committees or approval of appointments to public office. However, the exercise of legislative powers does not amount to administrative action, and Article 47(2) of the Constitution cannot be the basis for an obligation on Parliament to provide reasons for accepting or rejecting views gathered during the public participation process in the law-making process.
- k) While there is no express obligation on Parliament to provide reasons for accepting and/or rejecting proposals/views made during a public participation exercise, as a matter of good practice, it must nonetheless put in place reasonable measures to ensure it considers the proposals, views, suggestions, and comments received during such an exercise.
- l) The National Assembly's Departmental Committee on Finance and National Planning's 'Report on the Consideration of the Finance Bill (National Assembly Bill No. 14 of 2023)' met the threshold of a reasonable measure for considering proposals, views and suggestions from the public, with respect to the public participation exercise conducted on the Finance Bill, 2023.
- m) In line with Article 221 (6) of the Constitution, Estimates of Revenue are not a component of the Appropriations Act. The preparation and tabling of the estimates of revenue and expenditure precede the preparation and tabling of the Appropriation Bill.
- n) The Estimates of Revenue and expenditure for the FY 2023/2024 were tabled and considered before the National Assembly as required by law.
- o) Generally, courts should restrain from intervening in policy matters. However, the High Court under Article 165 of the Constitution retains residual jurisdiction to determine the constitutionality of any law, policy matter or decision within the meaning of Article 165(3)(b) & (d) of the Constitution.
- p) In determining whether to declare a statute or part thereof as unconstitutional, a court should take into account the following:
- i. There is a general but rebuttable presumption that a statutory provision is consistent with the Constitution.
 - ii. The party that alleges inconsistency has the burden of proving such a contention.
 - iii. In construing whether statutory provisions or part thereof offend the Constitution, courts must subject the same to an objective inquiry as to whether they conform with the Constitution.
 - iv. The court must determine the object and purpose of the impugned statute and consider the mischief which the statute sought to cure and/or arrest.
 - v. The court must clearly set out what provision is unconstitutional by juxtaposing the offending provision against the Constitution.

- vi. *A court must clearly and with precision explain the finding of unconstitutionality.*
 - vii. *The court must consider the effect of that declaration and, where necessary, suspend the application of that unconstitutionality for a prescribed of time to allow for Parliament to change the law by either making it achieve its purpose without being unconstitutional or by removing the unconstitutional provision.*
- q) *The criteria that ought to guide a court in determining whether to issue a suspension of declaration of invalidity is as follows:*
- i. *Suspension of invalidity is a remedy that is in the nature of a just and equitable relief, while ensuring that there is no disruption to the regulatory aspects of the statutory provision that is invalidated.*
 - ii. *The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship.*
 - iii. *Whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification.*
 - iv. *Whether there are multiple ways in which Parliament could cure the unconstitutionality of the legislation.*
 - v. *The right in question will not be undermined by suspending the declaration of invalidity.*
 - vi. *Whether the suspension would be in the interest of justice and good governance, that is, whether the declaration of invalidity causes more than an inconvenience but not go so far as to require the threat of total breakdown of government.*
 - vii. *A court must balance the interests of the successful litigant in obtaining immediate constitutional relief and the potential of disrupting the administration of justice.*
 - viii. *Whether there will be any countervailing considerations of hardship, prejudice or harm that would result from the continued operation of the statutes.*
 - ix. *In determining the period of suspension, the court should consider the following matters:*
 - (a) *The government's previous conduct;*
 - (b) *Whether there is any legislation in the pipeline; and*
 - (c) *The nature and severity of the continuing infringement.*

Recommendations

- a) *Parliament to put in place a legislative framework through statute for public participation as anticipated under Article 118(1)(b) of the Constitution.*
- b) *Parliament to establish measures to ensure that all versions of a Bill, at every stage of the law-making process, are accessible to the public for their information and scrutiny.*
- c) *As a matter of good practice, Parliament should put in place reasonable measures for considering the proposals, views, suggestions, and comments received during public participation exercise.*

Final Orders

Accordingly, the Court issued the following Orders:

- 1. The preliminary objection on this Court's jurisdiction is overruled.**
- 2. The consolidated appeal partially succeeds to the following extent:**
 - a. We hereby set aside the Court of Appeal's finding declaring the entire Finance Act, 2023 unconstitutional.**
 - b. We uphold the following findings by the Court of Appeal;**
 - i. That the question relating to Section 84 (Affordable Housing Levy) introduced by the Finance Act, 2023 before the Court of Appeal was moot.**
 - ii. That Sections 76 and 78 of the Act amending Section 7 of the Kenya Roads Act, 1999; Section 87 of the Act amending Section 28 of the Unclaimed Financial Assets Act, 2011 are unconstitutional as they were neither incidental nor directly connected to a money Bill.**
- 3. The 15th -19th & 22nd and 38th - 49th respondents' cross appeals are hereby dismissed.**
- 4. Each party will bear their costs of the consolidated appeal and cross-appeals.**

